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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARK FITZGERALD HARRIS, Plaintiff and Respondent, v. STEVEN GOURLEY, as Director, etc., Defendant and Appellant.	C040261 (Sup.Ct.No. 01CS01214)

The Department of Motor Vehicles (DMV) suspended Mark Harris's driver's license based on two convictions for driving under the influence, one in California and one in Nevada. Harris petitioned for a writ of mandate to rescind the order of suspension, contending his Nevada conviction was not substantially similar to a violation of Vehicle Code section 23152. The trial court granted the petition, finding Harris was convicted in Nevada of having a blood alcohol level of 0.10 percent or greater within two hours of being in actual physical

control of a vehicle; the conviction was not for driving. The DMV appeals. We agree with the trial court and affirm.

FACTS

On August 8, 2001, the DMV sent Harris notice that his driving privilege had been suspended for two years as of August 25, 2000. The action was due to two convictions: a conviction on August 7, 2000, in Sacramento, for violating Vehicle Code section 23152, subdivision (a); and a conviction on August 25, 2000, in Nevada, for "DWI."

Harris petitioned for a writ of mandate commanding Steven Gourley, the director of the DMV, to rescind the suspension order and remove the Nevada conviction from his driving record. Harris asserted his conviction in Nevada was not substantially similar to the conduct prohibited by Vehicle Code section 23152 and therefore could not be used to suspend his license.

Harris provided a copy of the judgment of conviction from Nevada. It stated: "Defendant pled guilty to a violation of Carson City Municipal Code 10.22.020/NRS 484.379, HAVING 0.10% OR MORE BY WEIGHT OF ALCOHOL IN THE BLOOD WITHIN TWO HOURS OF BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE, first offense, a misdemeanor."

Harris also provided copies of Nevada Revised Statutes section 484.379, subdivision (1)(c) and Carson City Municipal Code section 10.22.020. Nevada Revised Statutes section 484.379, subdivision (1)(c) provides as follows: "It is unlawful for any person who: [¶] . . . [¶] (c) Is found by measurement within 2 hours after driving or being in actual

physical control of a vehicle to have a concentration of alcohol of 0.10 or more in his blood or breath, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access." Carson City Municipal Code section 10.22.020 is very similar, providing in part as follows: "It is unlawful for any person who: [¶] . . . [¶] (c) Is found by measurement within two (2) hours after driving or being in actual physical control of a ehicle to have 0.10 percent or more by weight of alcohol in his blood, to drive or to be in actual physical control of a vehicle on a public street or highway or on premises to which the public has access within Carson City."

The DMV opposed the petition, arguing the record of conviction in Nevada "is clearly based on the offense of driving under the influence, . . ." In support of its position, the DMV provided the declaration of a staff services analyst from the DMV with certain exhibits attached. Exhibit 2 was the Nevada Highway Patrol arrest record, which indicated Harris had been stopped for speeding, appeared to be under the influence of alcohol, failed field sobriety tests, and was given a breath test. The two samples showed a blood alcohol level of 0.116 percent.

The DMV also provided a complete copy of the Nevada court conviction. In addition to the judgment of conviction, there was a "Waiver of Rights" form. On the first section of this form, Harris initialed the charges. The term "driving" was crossed out and "being in actual control" was underlined.

The trial court granted the petition, finding the record of conviction did not show Harris had been convicted in Nevada of driving under the influence.

DISCUSSION

Under Vehicle Code section 13352, subdivision (a), the DMV shall suspend or revoke the driving privileges of any person upon receipt of a certified court record showing a conviction for violating Vehicle Code section 23152. (All further unspecified statutory references are to the Vehicle Code.) Upon the second conviction in seven years, the license suspension is for two years. (§ 13352, subd. (a)(3); § 23540.) A conviction in another state, that if committed in California would be a violation of section 23152, is a conviction of 23152 for purposes of license suspension. (§ 13352, subd. (d).)

Section 23152 prohibits *driving* a vehicle while under the influence of alcohol or with a certain blood alcohol level. Section 23152 provides in part: "(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle. [¶] (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle."

The problem in this case arises because the Nevada statute and the Carson City ordinance are broader than section 23152. In addition to prohibiting driving under the influence of alcohol or with a certain blood alcohol level, the Nevada laws

also prohibit being in actual physical control of a vehicle in such condition.

This court addressed a similar situation in *Draeger v. Reed* (1999) 69 Cal.App.4th 1511. In *Draeger*, the DMV suspended Draeger's license based on two drunk driving convictions, one in California and one in Florida. The Florida statute, like Nevada's, prohibited both driving and being in actual physical control of a vehicle while under the influence or with a certain blood alcohol level. This court found section 23152 was substantially the same in language, interpretation, and enforcement as the driving prong of the Florida statute. (*Id.* at p. 1522.) The driving prong of the Florida statute could be used to suspend a license under section 13352 "where the description of the violation from which the conviction arose clearly shows the conviction was based on drunk *driving*, as opposed to 'actual physical control' of a vehicle while under the influence of alcohol." (*Ibid.*; original italics.)

The license suspension could not stand in *Draeger* because the DMV had insufficient admissible evidence to show Draeger was convicted of drunk *driving*. The only evidence was the police report and the traffic citation. The police report was not part of the record of conviction and could not be considered. (*Draeger v. Reed, supra*, 69 Cal.App.4th at p. 1523.) The traffic citation was part of the record of conviction, but was insufficient alone to show driving. (*Ibid.*) The DMV could decide to pursue the suspension with a complete record of conviction. (*Ibid.*)

Here, the DMV has the complete record of conviction. Unfortunately for the DMV, however, it does not show a Nevada conviction based on driving. Rather, both the plea form and the judgment of conviction clearly indicate Harris pled guilty only to being in actual physical control of a vehicle with a certain blood alcohol level. While it may be undisputed that Harris was actually driving, he was not convicted of driving, but of being in actual physical control. Simply being in actual physical control would not qualify for a conviction under section 23152.

The DMV argues that under the Driver License Compact, under which Nevada reported Harris's conviction, only offenses involving driving are to be reported. (§ 15023.) Since Nevada reported the conviction, and since there is a presumption that official duty is regularly performed (Evid. Code, § 664), the DMV argues, the conviction must have been for driving under the influence. The presumption that official duty is regularly performed is a rebuttable presumption. (Evid. Code, § 660.) The actual record of conviction rebuts any presumption that Harris's conviction was for driving.

The DMV complains that since the facts of this case show Harris was driving with a blood alcohol level of over 0.10 percent, he should not be able to avoid the license suspension provisions of section 13352 simply by plea bargaining to the actual physical control prong of the Nevada statute. We are sympathetic to the DMV's frustration in this case. We are not, however, free to rewrite the statute to relieve that frustration. Any relief must come from the Legislature.

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

NICHOLSON, Acting P.J.

RAYE, J.